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Malayan Banking Bhd v Skycon Development Sdn Bhd

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24NCVC-2562–10 OF 2012
SM KOMATHY JC
4 JUNE 2014

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Land — Charge — Order for sale — Application for — Application supported by certificate of indebtedness — Soft loan granted and repayment secured by charge over lands — Default in payment of loan — Borrower served with Form 16D to remedy breach — Whether evidence or any details to the correct amount of advance produced — Whether certificate of indebtedness reliable — Whether plaintiff true lender of loan — National Land Code s 356

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The plaintiff applied for an order for sale pursuant to s 356 of the National Land Code ('NLC') of 165 parcels of the defendant's land. The application was supported by a certificate of indebtedness in accordance with the terms of the charge. At the request of the defendant and by a letter of offer and loan agreement, Kewangan Bersatu Bhd ('KBB') granted and the defendant accepted a soft loan of RM11,500,000 ('the loan'). Repayment of the financing facilities was secured by, inter alia, a charge over 163 parcels of land in Mentakab, Pahang. By a vesting order, all assets and liabilities of KBB, including the loan and charge, were vested with the plaintiff. When the defendant defaulted in the repayment of the loan, the plaintiff demanded from the defendant payment of the sum of RM8,533,287.55 together with interest as secured by the charge. The defendant failed to pay the amount demanded and consequently the plaintiff, pursuant to s 254 of the NLC, served a notice in Form 16D requiring the defendant to remedy the breach within seven days from the date of breach. Upon the defendant's failure to remedy the breach, the plaintiff filed this originating summons. The defendant filed an application to strike out the originating summons under O 18 r 19(1) of the Rules of Court 2012 ('ROC') on the ground that the plaintiff was unable to substantiate the quantum claimed as outstanding in a civil action that was commenced earlier in respect of the same loan transaction. The application was allowed by the High Court, but on appeal, the striking out order was set aside by the Court of Appeal and the originating summons was directed to be heard on its merits. The issues that arose were whether the plaintiff had produced any evidence or any details with regard to the correct amount of the advance, the correct interest in arrears and the correct amount remaining due under the charge as mandated by O 83 r 3(3) of the ROC; whether the certificate of indebtedness was reliable; whether the plaintiff was the true lender of the loan; and the effect of the dismissal of plaintiff's claim in the civil action.

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Held, allowing the application with costs of RM25,000:

(1) It is common ground that the Rules of Court 2012 ('ROC') have repealed the Rules of the High Court 1980 and came into force on 1 August 2012. The new provision in the ROC is worded differently. The defendant's reliance on the above provision as a basis to argue there has been non-compliance with the rules of procedure is misconceived as the said provision is no longer applicable (see para 14).

(2) It was no longer a requirement for a chargee to state the particulars of the loan and/or the amount due and owing. Under the new provision, the chargee would merely be required to give the particulars of the amount. There was no obligation on the plaintiff to furnish a statement of accounts to proof the quantum or the correctness of the amount claimed in the certificate of indebtedness. By cl 30 of the charge annexure and section 16.09 of the loan agreement, the defendant had expressly agreed that the amount due shall be proven by a certificate of indebtedness (see paras 20–22).

(3) The onus was on the chargor to disprove the amount stated in the certificate of indebtedness. In the absence of any evidence adduced by the defendant to show that there was a manifest error or fraud in the certificate of indebtedness, the sum stated as due in the certificate of indebtedness must be accepted as correct. The contention of the defendant that the certificate of indebtedness is insufficient to prove the amount outstanding is untenable and contrary to established authority (see para 23).

(4) The defendant next contended that the loan had been obtained from an entity called ERF Sdn Bhd ('ERF') and not KBB. It was common ground that ERF was not a commercial bank. The loan was disbursed to the defendant through KBB as it was not permissible for ERF to disburse the loan directly to it. Section 30.01 of the loan agreement provided crucial support to the defendant's contention that ERF was the true lender. As such, only ERF would know the correct figure that was due and owing by the defendant. It was for this reason, the plaintiff's claim in the civil action had failed (see para 24).

[Bahasa Malaysia summary

Plaintif memohon bagi perintah jualan menurut s 356 Kanun Tanah Negara ('KTN') untuk 165 bidang tanah defendan. Permohonan tersebut disokong oleh sijil keberhutangan selaras dengan terma-terma pajakan. Atas permohonan defendan dan melalui surat tawaran dan perjanjian pinjaman, Kewangan Bersatu Bhd ('KNB') membenarkan dan defendan menerima satu pinjaman mudah berjumlah RM11,500,000 ('pinjaman tersebut'). Pembayaran semula kemudahan dipajak oleh, antara lain, satu pajakan atas 163 bidang tanah di Mentakab, Pahang. Melalui satu perintah letakhak,

kesemua aset dan liabiliti KBB, termasuk pinjaman dan pajakan, diletakhak pada plaintif. Apabila defendan ingkar dalam pembayaran semula pinjaman, plaintif menuntut bayaran sebanyak RM8,533,287.55 daripada defendan berserta dengan faedah seperti yang dipajak oleh pajakan. Defendan gagal membayar jumlah yang dituntut dan dengan itu, plaintif, di bawah s 254 KTN, memberikan notis dalam Borang 16D yang memerlukan defendan meremedikan pelanggaran dalam tujuh hari dari tarikh pelanggaran. Dengan kegagalan defendan untuk meremedikan pelanggaran, plaintif memfailkan saman pemula ini. Defendan memfailkan permohonan untuk membatalkan saman pemula di bawah A 18 k 19(1) Kaedah-Kaedah Mahkamah 2012 ('KKM') atas alasan bahawa plaintif gagal menyokong kuantum yang dituntut sebagai dihutangi dalam tindakan sivil yang dimulakan terlebih awal bagi transaksi pinjaman yang sama. Permohonan dibenarkan oleh Mahkamah Tinggi tetapi selepas rayuan, perintah pembatalan diketepikan oleh Mahkamah Rayuan dan saman pemula diarahkan dibicarakan atas merit. Isu-isu yang bangkit adalah sama ada plaintif telah mengemukakan sebarang keterangan atau sebarang butir-butir bagi jumlah betul yang didahulukan, faedah tertunggak yang betul dan jumlah terhutang yang betul di bawah pajakan seperti yang dimandatkan oleh A 83 k 3(3) KKM; sama ada sijil keberhutangan boleh dipercayai; sama ada plaintif adalah peminjam sebenar pinjaman tersebut; dan kesan penolakan tuntutan plaintif dalam tindakan sivil.

Diputuskan, membenarkan permohonan dengan kos sebanyak RM25,000:

(1) Adalah dipersetujui bahawa KKM telah memansuhkan Kaedah-Kaedah Mahkamah Tinggi 1980 dan berkuat kuasa pada 1 Ogos 2012. Peruntukan baru dalam KKM ini telah digubal dengan berbeza. Pergantungan defendan pada peruntukan tersebut sebagai asas untuk menghujahkan bahawa terdapat ketidakpatuhan pada peraturan prosedur adalah salah tanggapan kerana peruntukan tersebut tidak lagi terpakai (lihat perenggan 14).

(2) Tidak lagi menjadi keperluan untuk pemegang gadaian menyatakan butir-butir pinjaman dan/atau jumlah yang terhutang. Di bawah peruntukan baru, pemegang gadaian hanya perlu memperuntukkan butir-butir jumlah tersebut. Tiada kewajipan ke atas plaintif untuk mengemukakan penyata akaun untuk membuktikan kuantum atau ketepatan jumlah yang dituntut dalam sijil keberhutangan. Melalui klausa 30 lampiran pajakan dan seksyen 16.09 perjanjian pinjaman, defendan telah secara nyata bersetuju bahawa jumlah keberhutangan dibuktikan oleh sijil keberhutangan (lihat perenggan 20–22).

(3) Beban terletak pada pemajak untuk menyangkal jumlah yang dinyatakan dalam sijil keberhutangan. Tanpa sebarang bukti yang dikemukakan oleh defendan untuk menunjukkan bahawa terdapat kekhilafan nyata atau

penipuan dalam sijil keberhutangan, jumlah yang dinyatakan sebagai terhutang dalam sijil keberhutangan mestilah diterima sebagai tepat. Hujahan oleh defendan bahawa sijil keberhutangan tidak cukup untuk membuktikan jumlah terhutang tidak dapat dipertahankan dan bertentangan dengan autoriti yang wujud (lihat perenggan 23).

(4) Defendan seterusnya menghujahkan bahawa pinjaman telah diperolehi daripada entiti yang dikenali sebagai ERF Sdn Bhd ('ERF') dan bukan KBB. Adalah jelas bahawa ERF bukan bank komersil. Pinjaman telah dibayar semula kepada defendan melalui KBB kerana ERF tidak dibenarkan memulangkan semula pinjaman tersebut secara langsung kepadanya. Seksyen 30.01 perjanjian pinjaman memperuntukkan sokongan padu kepada hujahan defendan bahawa ERF adalah peminjam sebenar. Oleh itu, hanya ERF yang akan tahu jumlah sebenar yang terhutang oleh defendan. Atas alasan ini, tuntutan plaintif dalam tindakan sivil gagal (lihat perenggan 24).]

Notes

For cases on order for sale, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2706–2873.

Cases referred to

Cempaka Finance Bhd v Ho Lai Ying & Anor (trading as KH Trading) [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77; [1997] 2 CLJ 36, FC (folld)

Legislation referred to

National Land Code ss 254, 256, 256(3), 266, 356, Form 16D
Rules of Court 2012 O 18 r 19(1)
Rules of the High Court 1980 O 83 r 3(3), 3(6)

Leonard Yeo (WY Wong with him) (Tay & Partners) for the plaintiff.
Hariharan (Tania Scivetti & Syazwani with him) (Scivetti & Assoc) for the defendant.

SM Komathy JC:

[1] By originating summons dated 4 October 2012, the plaintiffs applied for an order for sale pursuant to s 356 of the National Land Code ('NLC') of 165 parcels of the defendant's lands held under Mukim of Mentakab, District of Temerloh, Pahang Darul Makmur under a legal charge (Presentation No 3242 of 1995) dated 25 January 1995.

[2] The application was supported by a certificate of indebtedness in

accordance with the terms of the charge. The certificate of indebtedness exhibited to the application was in these terms:

> PENYATA JUMLAH TERHUTANG DAN PERLU DIBAYAR
>
> Peminjam/Penggadai: Skycon Development Sdn. Bhd. (No. Syarikat: 73864-V)
>
> Setakat 11.12.2012, jumlah yang terhutang dan perlu dibayar oleh Skycon Development Sdn Bhd kepada Malayan Banking Berhad adalah sebanyak RM8,594,227.44 bersama faedah pada kadar 2% setahun dengan kiraan harian dari 12.12.2012 sehingga tarikh pembayaran penuh.
>
> Bagi pihak Malayan Banking Berhad,
>
> .....t.t.....
>
> WAN ROSMAWATI BINTI WAN IBRAHIM
>
> Ketua Pemulihan/Pembentukan Semula Aset 3,
>
> Pengurusan Pemulihan Korporat
>
> Malayan Banking Berhad

[3] The defendant strenuously objected to the application on the ground that the quantam mentioned in the certificate of indebtedness was unreliable as the plaintiff was not able to prove the aforesaid quantum in Civil Action S1-22–388 of 2003 ('civil action') brought against it earlier to recover the same debt. It was therefore incumbent on the plaintiff to show that the quantum mentioned in the certificate of indebtedness was correct despite the provision in the charge stating that the amount mentioned in the certificate is conclusive evidence of the defendant's indebtedness.

BRIEF FACTS

[4] The factual matrix leading to the present dispute is relatively simple. At the request of the defendant and by a letter of offer dated 14 October 1994 ('letter of offer') and loan agreement dated 25 January 1995 ('loan agreement'), Kewangan Bersatu Bhd ('KBB') granted and the defendant accepted a soft loan of RM11,500,000 ('the loan').

[5] Repayment of the financing facilities was secured by, inter alia, by a charge ('the charge') over 163 parcels of land in Mentakab, Pahang. By a vesting order dated 28 September 2006, all assets and liabilities of KBB, including the loan and charge, were vested with the plaintiff with effect from 30 September 2009.

[6] When the defendant defaulted in the repayment of the loan the plaintiff, by its solicitors' letter dated 3 July 2012, demanded from the defendant payment of the sum of RM8,533,287.55 together with interest as secured by the charge.

[7] The defendant failed to pay the amount demanded and consequently the plaintiff, pursuant to s 254 of the NLC, served a notice in Form 16D dated 10 September 2012 ('Form 16D') requiring the defendant to remedy the breach within seven days from the date of breach. Upon the defendant's failure to remedy the breach, the plaintiff filed this originating summons.

[8] The defendant filed an application to strike out the originating summons under O 18 r 19(1) Rules of Court 2012 ('ROC') on the ground that the plaintiff was unable to substantiate the quantum claimed as outstanding in a civil action that was commenced earlier in respect of the same loan transaction. The application was allowed by the High Court, but on appeal, the striking out order was set aside by the Court of Appeal and the originating summons was directed to be heard on its merits.

THE LAW

[9] It is a well settled principle that in a foreclosure action, an order for the sale of the charged property will be made unless the chargor is able to satisfy the court of the existence of cause to the contrary. This principle is codified in s 256 of the National Land Code which provides:

> (1) This section applies to land held under —
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> (a) Registry title;
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> (b) the form of qualified title corresponding to Registry title; or
>
> (c) subsidiary title, and to the whole of any undivided share in, or any lease of, any such land.
>
> (2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the Court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.
>
> (3) *On any such application, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.* (Emphasis added.)

[10] In *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77; [1997] 2 CLJ 36, the Federal Court explained the meaning of the expression 'cause to the contrary' in s 256(3) as follows (at 82):

> The critical phrase in sub-s (3) of s 256 to which we have lent emphasis, despite

A having been the subject of judicial pronouncements, continues to demand the attention of courts. There is no doubt that, upon a plain reading of the subsection, a High Court is entitled to refuse an order for sale of charged property once it is satisfied of the existence of cause to the contrary. But the question then arises: what is meant by 'cause to the contrary'?

B In our judgment, 'cause to the contrary' within s 256(3) may be established only in three categories of cases.

First, it may be taken as settled that a chargor who is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s 340 of the Code establishes cause to the contrary ...

C Secondly, a chargor may show cause to the contrary within s 256(3) of the Code by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale. For example, failure on the part of the chargee to prove the making of a demand or service upon the chargor of a notice in Form 16D would constitute cause to the contrary. So too, where the notice

D demands sums not lawfully due from the chargee ...

Thirdly, a chargor may defeat an application for an order for sale by demonstrating that its grant would be contrary to some rule of law or equity.

E And later added:

In the absence of such strong and compelling reasons as were present in Narayanasamy or Lee Tan Hua a court would not be justified in withholding relief to a charge under s 256 of the Code. To act otherwise would be to ignore the mandatory language of s 256(3) read with s 340 (1) of the Code. See, *Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1992] 2 MLJ 650.

F ...

If the courts of this country interpret the phrase 'cause to the contrary' appearing in s 256(3) of the Code liberally, then institutional lenders would loose confidence in their right to realise their security through an order for sale. Financial institutions would then become reluctant to lend money to bona fide entrepreneurs.

G Commence would come to a standstill and the development of land and industries in this country which are largely dependent upon loans from banks would cease. No judgment of this court will be designed to produce such a consequence.

H **[11]** This case exemplifies the principle that the court is statutorily obliged to make an order for sale, unless the chargor is able to establish facts that come within the three categories of cases as outlined by the Federal Court.

ISSUES

I **[12]** The defendant sought to show there was 'cause to the contrary' by raising these issues:

(a) The plaintiff had failed to produce any evidence or any details with regard to the correct amount of the advance, the correct interest in

arrears and the correct amount remaining due under the charge as mandated by O 83 r 3(3) of the RHC;

(b) The certificate of indebtedness was unreliable;

(c) The plaintiff was not the true lender of the loan in this case; and

(d) The effect of the dismissal of plaintiff's claim in the civil action.

Issue 1: The failure to provide particulars required by O 83 r 3(3) of the RHC

[13] The defendant contended that the plaintiff had, in breach of O 83 r 3(3) of the Rules of the High Court 1980 ('RHC 1980') failed to produce any evidence or any details with regard to the correct amount of the advance, the correct interest in arrears and the correct amount due under the charge. The omission to comply with the requirements of the provision was fatal. Order 83 r 3(3) reads:

> Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the chargor with particulars of:
>
> (a) the amount of the advance;
>
> (b) the amount of the repayment;
>
> (c) the amount of any interest or instalments in arrears at the date of issue of the originating summons and at the date if the affidavit; and
>
> (d) the amount remaining due under the charge.

[14] The defendant's reliance on the above provision as a basis to argue there has been non-compliance with the rules of procedure is misconceived as the said provision is no longer applicable as it has been replaced by a new provision . It is common ground that the Rules of Court 2012 ('ROC') have repealed the RHC 1980 and came into force on 1 August 2012. The new provision in the ROC is worded differently and reads:

> Where the plaintiff claims delivery of possession the affidavit shall show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, *the particulars of the amount remaining due under the charge as at the hearing date of the originating summons*. (Emphasis added.)

[15] It is clear from a reading of the new provision that it is no longer a requirement for a chargee to state the particulars of the loan and/or the amount due and owing. Under the new provision, the chargee is merely required to give

the particulars of the amount remaining due under the charge as at the hearing date of the originating summons. The plaintiff has complied with this requirement as evidenced by exh A9.

[16] In any event, the same point has been addressed by the Federal Court in *Low Lee Lian* (at [10]). The court explained that the failure to give a proper account of the sums due does not amount to cause to the contrary. The following passage from the judgment of the Federal Court (at 51) bears reproduction in full:

> An application under s 256 is opposed by the chargor on the ground that the charge has acted in breach of the contract, eg, by not releasing monies due under the loan agreement or by increasing the rate of interest without proper notice or *by not giving any proper account of the sums paid by the borrower*. A judge faced with such complaints will merely say that they do not, on a proper reading of s 256(3) and the authorities which have considered the section, constitute cause to the contrary. He will not, and ought not to, enter upon a discussion of the question whether any or all of these complaints have or are devoid of merits.

[17] In the result, I find the defendant's contention that there was a statutory obligation on the plaintiff to give a proper account of the sum outstanding as set out in O 83 r 3(3) of the RHC 1980, unsustainable.

Issue 2: The certificate of indebtedness

[18] The defendant next contended that the amount stated as due in the certificate of indebtedness was incorrect and unreliable. This contention was premised on the following facts. It was common ground that in the civil action, the plaintiff had sued the defendant to recover monies due to it based on the same loan transaction as in this case. However, the plaintiff's claim was dismissed due to its inability to produce any credible evidence to establish the quantum that was due and payable by the defendant. The dismissal of the plaintiff's claim by the High Court was affirmed by the Court of Appeal.

[19] Based on the foregoing, the defendant argued that it was incumbent on the plaintiff to produce a statement of accounts to prove that the sum mentioned in the certificate of indebtedness was correct. It was said that the defendant as chargor, was entitled to be shown credible evidence of its indebtedness to the charge, so that it may know what is the exact sum that it is legally bound to pay as provided by s 266 of the NLC.

[20] Again, I find no merit in the submission made by the defendant. It is contrary to O 83 r 3(6) of the ROC which provides:

Where the plaintiff claims payment of moneys secured by the charge, the affidavit shall prove that the money is due and payable and give particulars mentioned in paragraph (3).

[21] The plaintiff submitted, and I wholly agree, that there is no obligation on the plaintiff to furnish a statement of accounts to proof the quantum or the correctness of the amount claimed in the certificate of indebtedness. By cl 30 of the charge annexure and section 16.09 of the loan agreement, the defendant had expressly agreed that the amount due shall be proven by a certificate of indebtedness.

[22] It is now well established that a certificate of indebtedness is conclusive proof of a defendant's indebtedness. That proposition was established authoritatively by the Federal Court in *Cempaka Finance Bhd v Ho Lai Ying & Anor (trading as KH Trading)* [2006] 2 MLJ 685; [2006] 3 CLJ 544. There, the court rejected the argument that the amount stated in the certificate of indebtedness must be proven by the chargee. This point was articulated by Steve Shim CJ (Sabah and Sarawak) as follows (at 691–692):

[10] ... With respect, such a proposition goes against the entrenched principles enunciated by Raja Azlan Shah CJ (Malaya) (as His Highness then was) in *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 when he said, inter alia:

We have often said in this court many a time that where the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the assistant registrar or the judge in chambers, or, for that matter, this court shall not deal with the whole matter under the RSC O 14 procedure. In the present case, the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents. ... It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate.

[11] *The above dictum establishes firmly the conclusive nature and extent of a certificate of indebtedness. A certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claim*.

[12] In the instant case, the relevant cll 27 and 7.03 of the loan agreement and guarantee agreement respectively are sufficiently clear. A clause of this nature has been described as a conclusive evidence clause. Such a clause has been held to be binding and valid by courts in Australia and England. In *Dobbs v National Bank of Australiasia* (1953) 53 CLR 643the Australian court made the following observation which we think is instructive:

... The bank could recover without the production of a certificate if, by ordinary

> legal evidence, it proved the actual indebtedness of the customer. But the (conclusive evidence) clause, if valid, enables the bank by producing a certificate to dispense with such proof. It means that for the purpose of fixing the liability of a surety, the customer's indebtedness may be ascertained conclusively by a certificate. ... But the manifest object of the clause was to provide a ready means of establishing the existence and amount of the guaranteed debt and avoiding an inquiry upon legal evidence into the debits going to make up the indebtedness.
>
> [13] The certificate of indebtedness, exh P3, issued in accordance with cll 27 and 7.03 aforesaid, are lucid enough. There is nothing to indicate or suggest any manifest error on the face of the said certificate nor is any fraud shown. In the circumstances and given the authorities cited, we take the firm view that the answer to the first question must be in the affirmative whereas the second question has to be answered in the negative. (Emphasis added.)

[23] It is clear from the above passage that the onus is on the chargor to disprove the amount stated in the certificate of indebtedness. In the absence of any evidence adduced by the defendant to show that there was a manifest error or fraud in the certificate of indebtedness, the sum stated as due in the certificate of indebtedness must be accepted as correct. The contention of the defendant that the certificate of indebtedness is insufficient to prove the amount outstanding is untenable and contrary to established authority.

Issue 3: Whether the plaintiff was the true lender of loan?

[24] The defendant next contended that the loan in the instant case had been obtained from an entity called ERF Sdn Bhd ('ERF') and not KBB. It was common ground that ERF is not a commercial bank. It was argued that the loan was disbursed to the defendant through KBB as it was not permissible for ERF to disburse the loan directly to it. Section 30.01 of the loan agreement provided crucial support to the defendant's contention that ERF was the true lender. As such, only ERF would know the correct figure that was due and owing by the defendant. It was for this reason, the plaintiff's claim in the civil action had failed.

[25] In my judgement, this argument fails on two grounds. Firstly, the involvement of ERF is a non-issue as all security documents, particularly the letter of offer and legal charge are purely between the plaintiff and defendant. ERF was not made a party, and neither was it made privy to any of these documents. Secondly, and more importantly, the identity of the 'true lender' is no longer a 'live' issue as the same issue had been raised and determined by the High Court in the civil action. The decision of the High Court on this issue, has been confirmed on appeal by the Court of Appeal and Federal Court. In this connection, it will be useful to refer to the following passage in the grounds of judgment of the Justice Rosilah bt Yop (at 36):

> Walaupun seksyen 13.01 memperuntukkan demikian dan di dalam tindakan ini tiada permintaan bertulis daripada ERF, saya berpendapat bahawa plaintif boleh mengeluarkan notis tuntutan kepada defendan pertama mengenai tunggakan pinjaman yang tertunggak dan perlu dibayar kerana pada asasnya P2 ini telah pun dipersetujui antara ERF, plaintif dan defendan pertama ...
>
> Maka saya berpendapat walaupun terdapat peruntukan seksyen 13.01 berkenaan, ianya tidak menghalang plaintif untuk mengeluarkan notis tuntutan kepada defendan pertama.

Issue 4: Dismissal of the plaintiff's civil action

[26] It is trite law that the outcome of an action in personam is wholly irrelevant and has no effect on foreclosure proceedings commenced based on the charge executed by the chargor. The dismissal of the civil action, therefore, cannot and does not prevent the plaintiff from applying for an order for sale in respect of the properties charged to it as security. By applying for an order for sale, the plaintiff is merely enforcing its rights by exercising its statutory remedy against the defendant in default. The plaintiff is not suing for a debt and its claim is not based upon a covenant but under the charge.

[27] In *Low Lee Lian* (at [10]), the Federal Court addressed the issue in the following passage:

> A judge who makes an order for sale merely finds that the facts relied upon by the chargor to resist the chargee's application do not constitute cause to the contrary. He is unconcerned with the issue whether the same facts are sufficient to support an action in personam that may be brought by the chargor against the charge.

[28] The decision in *Low Lee Lian* establishes that in foreclosure proceedings, the court is not concerned with whether the plaintiff had succeeded in proving the amount due and owing in the civil proceedings or otherwise. The outcome of the civil action has no bearing and relevance in foreclosure proceedings, which is an action in rem. The defendant's contention that following the decision in the civil action, this foreclosure action should fail is a *non sequitur*.

CONCLUSION

[29] I therefore allow the plaintiff's application for an order for sale of the properties identified in the application. The defendant's objections do not constitute 'cause to the contrary' as clearly laid down in the Federal Court case of *Low Lee Lian*. I further order that the defendant pay the plaintiff costs of RM25,000.

[30] Finally, I thank counsel for the help they gave me in their clear and careful submissions.

Application allowed with costs RM25,000.

Reported by Afiq Mohamad Noor